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SOME SUGGESTIONS FOR AMENDING THE COMPANIES ACT

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In their Memorandum issued by the Government of India (Commerce Department) it is now definitely stated that "Government do not propose to undertake a wholesale revision of the Indian Companies Act but will confine the amendments only to such reforms as are urgently necessary".

As a lawyer who has had occasion to come in contact with and acquire some intimate knowledge of the working of several companies in South India, I venture to suggest the following reforms as urgently necessary to be carried out in the interests of shareholders and the investing public and better and more efficient and honest management of joint stock companies.

I

The first thing necessary is to protect investors from false and misleading advertisements, announcements, circulars and other invitations to subscribe for shares issued to the public by astute and unscrupulous promoters who take care to circumvent the specific requirements of section 93 of the Act by simply adopting the technical ruse of inserting in the invitations some such words as "This is not a prospectus. For further details regarding the agreements with the vendors, Managing Agents, etc., reference should be made to these documents at the Registered Office of the Company" and so on. The Registered Office of the Company being in many cases hundreds of miles away from the territories where the invitations are issued, eager investors beguiled by the announcements in golden colours rush in to apply without further thought and fall into the traps of bogus companies with miserable results. The needlessly narrowed definition of 'prospectus' in section 2 (14) of the Act must be so amended as to include every kind of announcement intended or calculated to invite the public to take up shares in a public company.

Further every prospectus and every announcement, advertisement or other public offer or invitation to subscribe for shares must contain in clear terms and in a conspicuous manner a statement as to whether or not permission to deal in the proposed shares has been applied for or obtained from or refused by any and which Stock Exchange. As whenever a company announces a public offer intending investors not unnaturally expect to obtain a marketable investment, this requirement as to Stock Exchange permission, will be valuable information putting investors on

guard as to deciding whether or not they would be prudent in putting their monies into the proposed venture. The sanction behind such permission is the fact that it will not be granted unless the company is a sound one from the investment point of view.

II

Whatever the usefulness of the Managing Agency system in the distant past, recent developments within the last quarter of a century at least have shown that it has outgrown its utility and led to many abuses ; with the result that opinion among the shareholding public today is preponderantly if not completely against it. Without going into the controversy over the subject or advocating its abolition altogether, it may be suggested that if the provisions of the Act relating to the remuneration and powers of management of the Managing Agents are so amended as to reduce them strictly to the position of " agents " subordinate to the governing body of Directors, the scope for the mastery and exploitation of the Companies under their charge which for all practical purposes they treat as their own proprietary sinecure, will possibly disappear or at any rate considerably narrowed down and there will be no cause for a good many of the complaints now levelled against them. It is the weakness of the law as it is that has in very many cases given gratuitous support to obscurantist Managing Agents.

My suggestions in this connection are :—

(i) The Managing Agents of a company should be its wholetime employees and be expressly prohibited by the statute from acting as the Managing Agents of any other company or engaging in any trade or business in rivalry with or similar to that of the company, either as proprietor, partner or Director or otherwise. Section 87-H is not sufficiently protective in this respect.

(ii) Any agreement of Managing Agency entered into prior to the incorporation of a company or before the commencement of its business shall be provisional only and not binding on the company unless ratified and accepted with or without modification by a general meeting specially convened for this purpose. A copy of the agreement shall be annexed to the Articles or furnished to the members along with the notice convening the meeting so that an opportunity may be given to the members to consider its terms and conditions and decide for themselves whether and what conditions therein are detrimental to the interests of the company. Under the existing law and practice, comprehensive and onerous agreements supposed to have been entered into prior to their incorporation actually tie the companies and their Directors hand and foot and make the position of the Managing Agents unshakeable as the real masters of the situation.

(iii) There must be a specific provision in the Act prohibiting the taking by Managing Agents of any remuneration, allowances, perquisite or other advantage having a money value, other than the agreed percentage of the net profits provided in the agreement and such reasonable office and other allowance as may be approved by the company in general meeting according to circumstances from time to time. At present the Managing Agents of almost every prosperous company are taking such large commission on sales, purchases, etc., and receiving so many legal and illegal and secret advantages so extravagant and wasteful on their face, and out of all proportion to the services rendered by them, that the system itself has come to be disgusting if not revolting to good conscience. It will be a real safeguard to the shareholders if the annual profit and loss account is required to disclose with sufficient particulars the various species of income derived by the Managing Agents from the company.

(iv) Sometimes by rigging and sometimes by 'churning' the market for the shares of the companies under their charge the Managing Agents of many companies are manipulating the market value of such shares to their own advantage and amass thereby large private fortunes for themselves and sometimes by a planned declaration of far lower dividends than the profits of the company would warrant, they depress the market for their shares and acquire and accumulate in their own hands, the bulk of the shares of the companies under their cntrol.

This evil can be checked, to a considerable extent by insisting that whenever a declaration of dividend is made, it must be accompanied by a statement disclosing the total profits earned and the amount out of it made available for distribution as dividend. This will prevent the creation of a false market in the shares of the company concerned and eschew the possibility of any undue advantage to those in management. Such a statement is insisted on by the "London Stock Exchange" and adopted by all companies whose shares are permitted to be dealt with by that Exchange. There is no reason why such a wholesome provision should not be insisted on by the adoption of an appropriate compulsory regulation in Table A of Schedule I of the Act.

III

In very many cases with a view to have assured a directorate subservient to their own wishes the promoters and Managing Agents who usually frame the constitution of the company at the time of its formation, get fixed under the Articles a very high share qualification for directorship by election; with the result that the majority in number of the shareholders who are generally small holders, are not able to choose even a single 'independent' Director as representing their body.

And if per chance one or two Directors happen to be elected who are able to assert themselves against bad or improper management and in the larger interests of the share-holding public, they are threatened with the Democles sword handing over their heads as per a specially provided article in the constitution of the company, giving power to the majority of Directors to remove such Director or Directors without assigning any reason (for instance we find an article of this kind in the Madura Mills Co., Ltd., one of the biggest joint stock companies in this country).

It is therefore absolutely necessary to make statutory provision to the effect not only that the minimum share qualification for a Director shall be kept as low as reasonably possible, say twenty-five shares, but that a Director elected by the general body of shareholders shall not be removed for other than statutory reasons, except by that body. The well-meant sub-section (2) of section 86-I giving a company power to provide by its articles other grounds in addition to those given in that section, for removal of Directors has been astutely utilised by scheming Managing Agents for thier own aggrandizement.

2. Generally in the case of most companies managed by Managing Agents a subservient directorate is procured by them by getting hold even from the outset, of a set of 'guinea pigs', a line-of-least resistance men who are willing to lend their names, embellished with all the honours bestowed on them in some totally different walks of life. In order to discourage the functioning of such inefficient and subservient directorates, a provision in the Act will have to be enacted that in all cases of fraud, misappropriation or illegal application of company funds or omissions of a fraudulent nature, there should be joint liability of the Directors. As the Directors have a statutory right of access to the books of accounts of a company [section 130 (2)] and as under the compulsory Article 71 of the Table A of Schedule I the management of the business of the company is their responsibility it is not unjust to demand

vigilant and proper care and attention on their part in respect of the affairs of the company entrusted to their charge. The law, as it is, by making a distinction between the consciously fraudulent Director and his incompetent colleague would seem to put a premium on the employment of 'guinea pigs' whom it will not be easy to eliminate so long as joint and collective responsibility is not insisted upon.

It will also conduce to vigilant and efficient functioning on the part of Directors if there be further a statutory prohibition that no person shall be Directors of more than, say, six companies, not being private companies. The less the number of companies which he has to serve the more will be his care and watchfulness as regards the direction and control of the affairs of each.

Another evil to be eliminated as regards the Directorate is the practice of Managing Agents, getting their own dependants and friends elected to the office of Directors by nominally transferring to them a specified number of their own shares enough to give such persons the necessary share qualification and at the same time protecting themselves by getting blank transfer forms signed by the nominees. The result of this is that the nominess hold their office of Directors at the will and pleasure of the Managing Agents and only so long as the Managing Agents might want them. This is an universal practice adopted by the management in almost all prominent companies where shares are concentrated in their hands and so long as it not put an end to, the so-called 'direction and control' supposed to be vested in the Board of Directors is an empty ostentation. This evil can only be avoided by a statutory insistence that the share qualification of a Director shall be the holding by him in his own absolute right a specified number of unencumbered shares and that every Director shall make a declaration to this effect, which shall be recorded in the Register of Directors and Managing Agents, with a copy being filed also, in the office of the Registrar.

IV

Bad management is encouraged not only by a subservient directorate but a submissive audit. The auditors are in theory supposed to be elected at general meetings of shareholders but in practice they are almost invariably the nominees of the management. Consequently if they displease the management or indicate the slightest assertion of independence in the carrying out of their duties they stand to lose their job. This embarrassing position of the auditors of companies has been time and again pointed out by the representatives of various associations of Chartered Accountants in England, but nothing effective has been done even in that country so far.

The position in this country is much worse owing to the fortified position of the Managing Agency system which extends its patronage to the auditors in other ways such as by appointing them also as the auditors of other companies and businesses and thus making them depend on the goodwill of the Managing Agents for the continuance of their office. The result is that human nature being what it is, even an honest auditor becomes obliged to connive or wink at such questionable practices as window dressing methods, secret appropriations, temporary defalcations, etc., adopted by those in management.

Any the slightest assertion of independence on the part of the auditors of a company will deprive them of any hope of being continued in their job for the succeeding years. As general meetings are practically controlled by the management there is no chance of any one except auditors of their own choice being elected or appointed at any time. The only method of ensuring a fearless and reasonably independent audit is to substitute for the present system of election at the annual general meeting, a method of election by postal voting by shareholders in some such manner as members of University Senate are elected by registered graduates.

A subsidiary evil in connection with the present system of audit is that whenever any questionable conduct on the part of the management arises in relation to the accounts of a company, the auditors with the object of screening the Managing Agent have developed a nefarious practice of certifying the Balance Sheet and Profit and Loss Account with a laconic reservation such as "subject to the special report of even date." While reference is thus made to a special report, such report is not annexed to the Balance Sheet or Profit and Loss Account and is studiously withheld from the shareholders, with the result that it does not come to their knowledge at all. This practice of making special report not made available to the members in the same manner as the Balance Sheet, etc., must be prohibited and penalised, if audit is to have any value at all. It is a strategy adopted for saving the skin of those responsible for managing a company's affairs including the Directors, and at the same time protecting the auditor from the charge of false certification.

Audit is the only real protection available to shareholders against bad management; and if that should be rendered ineffective, in any manner the days of joint stock enterprise will have to be counted.

V

In a good many cases the majority of shareholders of companies especially of companies whose shares are dealt with in the open market, are so scattered and live in such distant places from the company's office that they are seldom able to attend any meetings however important and vital, the subjects to be considered in those meetings may be for the protection of their own interest. Whatever justification there was for the original legal theory of corporate control exercised by personal attendance of shareholders, it is now a plain fact that company meetings based on personal attendance is *demode effete* and an anachronism. The wide geographical and economic distribution of company shareholdings and their dispossession among an increasing number of small holders who for various reasons lack the ability to organise themselves are circumstances affording a distinct advantage to the Managing Agents and Directors who are able to carry what all they want at general meetings either because they themselves are holders of a giant portion, of the shares carrying majority voting rights or they have got proxies with them ready to be used to silence any obstreperous shareholders who actually attend the meetings, put inconvenient questions affecting the management and want to vote against the intents or wishes of the management. The result is that general meetings are in most cases an empty farce.

To protect the shareholders as a body *vis-a-vis* the management especially bad management, it is very necessary that the Act *should* be suitably amended to the following effect :—

(i) No shareholder shall have voting rights more than in proportion to the amount of share monies paid by him. This will prevent the holders of deferred shares of small paid up value (usually only held by the Managing Agents, and their nominees and friends) exercising more voting rights than their actual contribution to the share capital will entitle them.

(ii) The votes that any single shareholder may exercise should be limited to a maximum of, say, twenty-five, irrespective of the number of shares held by him. This will put an effective check on the management out-voting the smaller shareholders however numerous they may be, by use of the very large number of shares concentrated in their hands. In the case of very many companies the 'one share one vote' principle has had the effect of crushing the minority voting rights of the numerical majority of small holders.

(iii) If the ill-effects of the present prevailing system of the Managing Agents and Directors facilitated by the entire organisation of the company at their disposal, procuring blank proxy forms signed by shareholders at distant places and keeping them as pocket proxies ready to be used as a weapon against all opposition at shareholders' meetings, can be mitigated to any extent, it will give some real measure of protection to shareholders desiring to voice their grievances against bad management at general meetings.

It is not however easy for legislation to make adequate provision against the misuse of proxies. The only thing practicable is by compulsory regulation in the articles to prohibit the use of general proxies and provide that proxies shall relate to specific meetings and specified resolutions to be proposed at any such meeting; and for guaranteeing the genuineness of the proxies it may also be provided that they should be dated and authenticated in the same manner as affidavits. This will act as a check against the present practice of obtaining blank proxy forms signed by shareholders, to be made use of accordingly as occasion may require. Further, proxies lodged with the company shall be open for inspection by shareholders at least for twenty-four hours previous to the holding of the meeting.

(iv) Under the existing provisions of the Act, a shareholder has no right to know the state of affairs of the company except to the extent disclosed in the Balance Sheet and Profit and Loss Account and the Directors Report. As was noted earlier it is not possible for very many of the shareholders owing to distance, expense and other reasons to attend the general meetings and even in the case of those who are able to attend the meetings if specific questions are asked by any of them either he is silenced or inadequately answered especially when such questions or the answers thereto are considered inconvenient to the management. The law as it now stands does not enable a shareholder to get from the company in which he has invested his monies any such information, facts or figures as he may desire, in order to judge for himself whether the company is well or ill-managed in any particular aspect or matter. A new and a very necessary right must therefore be given to shareholders, *viz*., to get written answers to written questions submitted by him to the company, on payment of a prescribed fee therefor. If for reasons of secrecy, policy or otherwise, any question is considered detrimental to the company's interests and should not be answered, the management should state so in writing, so that the matter may, if so thought fit by the aggrieved shareholder be scrutinised by a Court of law in appropriate proceedings. This will prove to be a real and substantial right conferred on shareholders living in distant places who after meditation on the Balance Sheet, Profit and Loss Account and other documents furnished to them by the company, would like to satisfy themselves further in respect of the company's affairs and its management.

(v) Another really effective method of protecting the shareholder against bad management is to liberalise the provision of section 138 of the Act relating to the investigation of a company's affairs by inspectors appointed by Government. In addition to the very restrictive condition now contained in the section the following three more qualified rights to apply or appoint as the case may be will have to be included, if really the provision for official investigation of the company affairs has to be made use of in proper cases—

(*a*) a right to any shareholder to apply for investigation in case the company fails to declare a dividend continuously for three years or the declared dividend as well as the net profits as disclosed by the profit and loss account has been declining by more than 25 per cent. for three consecutive years.

(*b*) a right to two-fifth in number of the Directors to apply if they are not satisfied with the management or the state of affairs of the company's accounts.

(c) where the Registrar on perusing any of the papers of the company has reasons to suspect anything fraudulent, dishonest or illegal in the management of its affairs.

At the same time, in order to protect the management from false, frivolous and vexatious applications or arbitrary action of the Registrar suitable provision may also be made giving a right to the company to apply for relief to the Court and the Court passing such orders as it may consider fit and proper under the circumstances.

VI

Mismanagement of companies has in part been due to the inadequate administrative machinery provided by the Act. The Registrar of Companies and Assistant Registrars appointed under the Act are, it is no exaggeration to say, entrusted with such multifarious, duties as to have practically no time to scrutinise the papers filed from time to time by the numerous companies within their jurisdiction. Further they cannot pretend to adequate knowledge of the Companies Act and are, again it is no exaggeration to say, almost entirely guided by the notes put up by the clerk in charge of company matters, who with his meagre salary cannot be expected to be above board. The result is that the filing of papers by companies before the Registrar is a mere formality affording no real check against contravention of the provisions of the Companies Act by bad management.

If the administration of the Act is to be efficient there should be whole time Registrars of Companies for each set of three or four districts, and they should possess adequate knowledge of Company Law, persons with accountancy qualifications being the most suitable for such posts. As the recent committee on Company Law Amendment in England (known as the Cohen Committee) pointed out for ensuring efficient and honest management of companies " it is important that observance of the requirements of the Companies Act should be vigorously enforced and still more important that where companies are improperly or dishonestly conducted, their affairs should be investigated and the offenders prosecuted ". This can be achieved only if a competent administrative machinery is set up for the purpose.

Another necessary amendment is with regard to courts exercising jurisdiction in company matters. The Court now having jurisdiction under the Act is the High Court except in respect of certain minor matters with regard to which the District Court is also given delegated jurisdiction. Whatever might have been the original reasons for conferring exclusive jurisdiction on the High Court, there is no reason under present conditions when numerous companies are being year after year registered in the moffusil districts for not extending to district courts jurisdiction over company matters also.

The conferring of exclusive jurisdiction on the High Court acts as an aid to bad management, as shareholders of companies situate in the districts have to incur heavy expenses besides undergoing other inconveniences in resorting to the High Court for relief.

VII

The above reforms are absolutely necessary if joint stock enterprise in India is to be sufficiently encouraged. Nowadays large aggregation of capital is necessary to the carrying on of large scale business efficiently and profitably. Such aggregations can be brought together only by draining small rivulets of capital into large reservoirs. Apart from nationalisation and State management, under the present

system of private economy industrial advancement can only be achieved by means of the limited liability company which, assured of proper management is the only real incentive to investment on the part of small holders of capital.

Some months ago Dr. Shyam Prasad Mookerjee, the Member for Industry and Supply speaking at a reception given to him by the Journalists' Association of Calcutta lamented on the mismanagement of big business as one of the contributing causes that stood against the building up of Indian industry. There is abundant testimony that the management of joint stock companies by Managing Agents assisted by Board of Directors consisting mostly of ' guinea ' pigs has given scope to innumerable abuses of which those indicated above are some of the worst. If the confidence of the investing public in limited companies is to increase stringent provisions by way of safeguards against frauds in company management, are necessary.

Of course statutory provisions can only declare that certain things are illegal and should not be done, and in suitable cases impose penalties for their contravention. But they cannot stop people contravening them. This is especially true with regard to the working of the Companies Act, the success of which essentially depends on the character of those who work it and the maintenance of a high standard of business morality in the administration of the companies. You cannot prevent the rogue from acting as a rogue merely by enacting that it is illegal to be a rogue and even providing for penalties where roguery is detected and established—I say 'established ' because it is very difficult to prove an offence and in ninety-nine cases out of hundred the rogue gets the benefit of the doubt and escapes. Further it must be remembered that whatever stringent safeguards the law may provide, it cannot protect fools against their folly to an unlimited extent, that is to say, you cannot make the Act completely knave-proof. Still the salutary effect of legal safeguards is undeniable and cannot be ignored.